



INTERIOR BOARD OF INDIAN APPEALS

David Pourier v. Acting Aberdeen Area Director, Bureau of Indian Affairs

19 IBIA 266 (03/21/1991)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

DAVID POURIER

v.

ACTING ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-4-A

Decided March 21, 1991

Appeal from disapproval of a U.S. Direct Loan application.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters: Financial Assistance

Decisions concerning whether a request for a U.S. Direct Loan should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indians: Financial Matters: Financial Assistance

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

APPEARANCES: David Pourier, pro se; Jerry Jaeger, Aberdeen Area Director, Bureau of Indian Affairs, for the Bureau of Indian Affairs.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant David Pourier seeks review of an August 22, 1990, decision of the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director;

BIA), disapproving his application for a U.S. Direct Loan. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands this case to the Area Director for further consideration.

Background

On February 6, 1990, appellant and his sister, Doreen Mills, filed an application for a U.S. Direct Loan in the amount of \$21,221.70 to restructure a real property mortgage. The application states as its purpose: "Buy out mortgage formerly Melvin Pourier mortgage from Mr. Edmund Hollstein, Attorney for Mary Ann Wefso. A reduction of \$10,000 was given on the Loan, land is in Probate Status. Since there's no will, therefore land will be divided to Children."

On February 27, 1990, the Supervisory Loan Specialist, Pine Ridge Agency, BIA, recommended approval of the loan, stating:

The probate judge has not returned any papers back to the Probate Specialist in Realty to date. There was no will made. The land will be divided to all [of decedent Melvin Jack Pourier's] adult children equally but the family made the agreement to have David Pourier and Doreen Mills to take care of his debts. An agreement is being written up by Attorney Marvin Amiotte.

The Pine Ridge Superintendent also recommended approval of the loan, and on February 27, 1990, forwarded the application to the Area Director. A May 11, 1990, memorandum indicates that the application was sent to the Deputy to the Assistant Secretary - Indian Affairs (Trust and Economic Development) Attn: Chief, Financial Services, prior to consideration by the Area Director. An undated, unsigned, memorandum to the Aberdeen Area Credit Officer from the Chief, Division of Financial Assistance, was received in Aberdeen on August 13, 1990. The memorandum stated:

We have completed our review of subject loan and are unable to recommend approval. The loan application proposes to borrow \$21,221.70 to buy the mortgage on their deceased father's home and other real estate.

The Indian Financing Act provides for financial assistance to any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit. Since this loan is not to an economic enterprise operating for a profit they are ineligible for financial assistance under the revolving loan program.

On August 22, 1990, the Area Director disapproved appellant's application, stating:

Our decision is based on the fact that the Indian Financing Act provides for financial assistance to any Indian-owned commercial, industrial or business activity established or organized

for the purpose of profit. Since this application is not to an economic enterprise operating for a profit, you would be considered ineligible for financial assistance under the Indian Revolving Loan Fund.

The Board received appellant's notice of appeal on September 25, 1990. The notice stated:

Appellant and his family own approximately 50 head of cattle and 160 acres of land.

Appellant's father purchased the land in question prior to his death. It was the intention of appellant's father and is the intention of appellant to purchase the land in question in order to expand the ranching operation. The ranching operation is certainly intended to operate as an economic enterprise operating for a profit.

It should also be noted that the Bureau of Indian Affairs, Pine Ridge Agency with Aberdeen Area Office approval, has previously approved U.S. Direct Loan applications for the purchase of a mortgage and other real estate. These loans were made to members of the Oglala Sioux Tribe within the past two years.

No other briefs were filed.

By order dated January 7, 1991, the Board ordered the Area Director to reconsider his denial of appellant's application, based upon the assertions made in appellant's notice of appeal. The Area Director's response states:

Our decision to disapprove [appellant's] application for a U.S. Direct Loan was based on the merits of his application.

In the Notice of Appeal, [appellant] advises that it is his intention to purchase the land in question in order to expand the ranching enterprise. His application failed to show that this is the purpose of his loan.

25 CFR, Part 101.3, Applications, provides: “. . . In addition, applications for loans to finance economic enterprises already in operation will be accompanied by: (a) A copy of operating statements, balance sheets and budgets for the prior two operating years or applicable period thereof preceding submittal of the application; (b) current budget, balance sheet and operating statements; (c) pro forma budgets, operating statements and balance sheet showing the estimated results for operating the enterprise for two years after injection of the loan funds into the operation. A resume of the applicant's management experience will be submitted with the application Applications for

loans or modifications thereof, to establish, acquire, operate, or expand an economic enterprise shall be accompanied by a plan of operation.”

[Appellant's] application did not contain any of the above information.

We do approve and have approved prior loans for trust mortgages and purchase of real estate in conjunction with expansion of farm/ranch enterprises.

[Appellant's] statements in his Notice of Appeal do not affect our decision in disapproving his application for a U.S. Direct Loan. Therefore, this application is again disapproved. [Omissions in original.]

Discussion and Conclusions

[1] As the Board recently repeated in Reed v. Minneapolis Area Director, 19 IBIA 249, 252 (1991), decisions concerning whether or not to grant a particular request for funding under one of BIA's Indian Financing Act programs are committed to BIA's discretion. It is not the Board's role to substitute its judgment for that of BIA. Instead, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. One limitation placed upon BIA's exercise of discretion is that the administrative record and the decision, read together, must be sufficient to show how BIA reached its conclusion. See also S & H Concrete Construction, Inc. v. Acting Phoenix Area Director, 19 IBIA 69, 71 (1990); Aubertin Logging & Lumber Enterprises v. Acting Portland Area Director, 18 IBIA 307, 308 (1990).

This case is before the Board because appellant's application appeared to request a loan merely to pay off an existing mortgage, without noting that the land covered by the mortgage was used as a family economic enterprise. 25 CFR 101.2(b) sets forth four purposes for which U.S. Direct Loans may be made. Three of those purposes relate to housing and education. The remaining purpose is “to finance economic enterprises operated for profit, the operation of which will contribute to the improvement of the economy of a reservation and/or the members thereon.” 25 CFR 101.2(b)(1). Loans for a family farming or ranching enterprise located on a reservation would appear to fall squarely under section 101.2(b)(1).

[2] The information concerning the use of the land for which appellant sought a loan was provided clearly for the first time in his notice of appeal. In Gauthier v. Portland Area Director, 18 IBIA 303, 305-06 (1990), the Board stated:

It is a general rule of appellate procedure that reviewing bodies do not normally consider information and/or arguments presented for the first time on appeal. The Board follows this general rule. * * * The Board finds, however, that this rule does

not apply to [Indian Financing Act programs] for the reasons discussed below.

* * * It is the initial responsibility of an applicant for assistance under BIA's Indian Financing Act programs to provide all information specifically required by the relevant regulations or requested on the standard application form or any accompanying instructions. When BIA receives such a fully completed application, it is required to consider all information provided in determining whether the application should be granted. The information requested may be sufficient for such a final determination. If, however, BIA finds that information relevant to its determination was not requested on the standard form, or that the application raises questions that were not fully addressed in the requested information, it should give the applicant an opportunity to provide the additional information needed for full consideration of the application. * * * Because it is improper to base a decision on the failure to provide information that was never requested, if BIA issues a decision and the record shows that the decision was based on the lack of information that was not requested either on the standard form or as a supplemental submission, BIA's decision is not supported by the record. Accordingly, the Board will allow an applicant under these programs to submit on appeal information relating to the basis of BIA's decision when that information was not requested on the standard application form or as a supplemental submission.

See also Aubertin, *supra*. This rule, applicable specifically in Indian Financing Act cases, is intended to ensure that all information relevant to a decision is considered by BIA, while keeping the adversarial nature of these proceedings to a minimum.

Therefore, in cases arising under the Indian Financing Act, the Board has adopted the general practice of requesting the Area Director to reconsider his or her initial decision when information is presented on appeal that indicates the Area Director's decision was based on incomplete information. When such an order is issued, the Area Director involved should carefully review the information presented on appeal which occasioned the Board's request for reconsideration, and, in his or her response, demonstrate that the new information has been fully considered. If such a showing is not made, the decision will be vacated and remanded.

In the present case, the standard form did not specifically require a statement that the requested loan was to benefit an economic enterprise. It would seem likely that the Agency Superintendent, who recommended approval of the loan, was aware of the limitations under the program and knew the way in which the land was being used. When another official reviewed the application and determined that it did not appear to meet the eligibility requirements, but approval had been recommended by a lower official, the reviewing official should have made further inquiries -- to the lower official, the applicant, or both -- asking for an explanation of how the

applicant was eligible for the requested loan. When appellant presented information on appeal indicating that the Area Director's decision was based upon incomplete information, the Board requested that the Area Director reconsider his decision. The Area Director's response did not show that the new information had been fully considered.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 22, 1990, decision of the Acting Aberdeen Area Director is vacated and this matter is remanded to him for further consideration.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge